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VOICES ON INNOCENCE

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VOICES ON INNOCENCE

68 FLORIDA LAW REVIEW – (Forthcoming 2016)

*Lucian E. Dervan, Richard A. Leo, Meghan J. Ryan,
Valena E. Beety, Gregory M. Gilchrist and William W. Berry III**

Introduction

Lucian E. Dervan

In the summer of 2015, experts gathered from around the country to sit together and discuss one of the most pressing and important issues facing the American criminal justice system – innocence. Innocence is an issue that pervades various areas of research and influences numerous topics of discussion. What does innocence mean, particularly in a system that differentiates between innocence and acquittal at sentencing? What is the impact of innocence during plea bargaining? How should we respond to growing numbers of exonerations? What forces lead to the incarceration of innocents? Has an innocent person been put to death and, if so, what does this mean for capital punishment? As these and other examples demonstrate, the importance and influence of the innocence issue is boundless. As the group, representing various perspectives, disciplines, and areas of research, discussed these and other questions, it also considered the role of innocence in the criminal justice system more broadly and examined where the innocence issue might take us in the future. What follows is a collection of short essays from some of those in attendance - essays upon which we might reflect as we continue to consider the varying sides and differing answers to the issue of innocence.

My own research regarding innocence began as part of a deep analysis of another topic, the historical rise of plea bargaining in the United States. Today, over 97% of convictions in the federal system and approximately 95% of convictions in the state systems are the result of guilty pleas.¹ Plea bargaining did not always occupy such a dominant role in America. For example, in

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the post-Civil War period, appellate courts regularly struck down attempts to engage in plea bargaining. According to one court from the period, plea bargaining was “hardly, if at all, distinguishable in principle from a direct sale of justice.”² But plea bargaining did rise from the shadows and, in the words of Supreme Court Justice Anthony Kennedy in 2012, “criminal justice today is for the most part a system of pleas, not a system of trials.”³

As I proceeded with my research on plea bargaining’s rise and its mechanics, I quickly came upon plea bargaining’s innocence issue. For example, in 2002, a seventeen-year-old high school student named Brian Banks was accused of rape.⁴ He was offered a plea bargain that carried a maximum sentence of seven years in prison, though he was assured he would actually serve much less time. The alternative was to proceed to trial and face a sentence of 41 years to life if he lost. As might be expected, Banks took the deal. Nearly a decade after the conviction, Bank’s accuser recanted and his conviction was reversed on March 24, 2012. Stories such as this led to much debate and contemplation about the impact of plea bargaining for defendants accused of crimes they had not committed. Were the Brian Banks of the world an anomaly? In 1970, the Supreme Court stated that plea bargaining was constitutional. In part, this decision rested on the Court’s belief that innocent people do not plead guilty.⁵ Was the Court wrong in making that assumption?

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¹ See United States Sentencing Commission, 2014 Sourcebook, Figure C (“Guilty Pleas and Trial Rates”), available at <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureC.pdf>; Jed S. Rakoff, *Why Innocent People Plead Guilty*, The New York Review of Books (Nov. 20, 2014), available at <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

² Lucian E. Dervan, *Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH LAW REVIEW 51, 59 (2012).

³ *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012).

⁴ See California Innocence Project, Brian Banks, available at <http://californiainnocenceproject.org/read-their-stories/brian-banks/>.

These questions led me and Dr. Vanessa Edkins to conduct a psychological study to test how likely it was that an innocent defendant might falsely confess and plead guilty in return for an offer of leniency.⁶ In the study, participants were made to believe that they were participating in a psychological inquiry into group work versus individual work. Participants were instructed that offering assistance to someone else during the individual work portion of the test was prohibited. Nevertheless, in approximately half of the cases, the participant was approached. Unbeknownst to the participants, however, the individual asking for the assistance was actually a confederate working with us on the study. This study design resulted in the creation of two pools of participants. Those who had been asked for assistance and agreed (the “guilty” condition) and those who had not been asked for assistance (the “innocent” condition).⁷ Regardless of condition, all participants were then accused of cheating and offered a plea bargain. Participants were informed that if they did not plead guilty, the case would proceed to a “trial” before an Academic Review Board (“ARB”). If found guilty before the ARB, the punishment would be more severe than if they accepted the bargain and confessed. After weighing their options, eighty-nine percent of the participants in the “guilty” condition took the deal and plead guilty to the charges of academic misconduct. Over fifty-six percent of the participants in the “innocent” condition also took the deal and, in their cases, falsely confessed to the charges of academic misconduct. Importantly, the data from this research supports the hypothesis that plea bargaining’s innocence issue is not limited to isolated cases like Brian Banks. Rather, it appears plea bargaining’s innocence issue may be much larger than originally perceived.⁸

The many contributing factors and potential solutions to plea bargaining’s innocence issue are too numerous to examine here. Plea bargaining, however, as illustrated by the above, is an important piece of the modern innocence debate and was the subject that prompted me to join with Professor Russell Covey to convene the 2015 innocence discussion. In the essays that follow, several others who participated in the roundtable share their perspectives on various additional nuances and facets of the issue of innocence.

⁵ See *Brady v. United States*, 397 U.S. 742, 758 (1970) (“We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary....”); see also Dervan, *Bargained Justice*, *supra* note 3 at 87-88.

⁶ Lucian E. Dervan and Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1 (2013); Vanessa A. Edkins and Lucian E. Dervan, *Pleading Innocents: Laboratory Evidence of Plea Bargaining’s Innocence Problem*, 21 CURRENT RESEARCH IN SOCIAL PSYCHOLOGY 14 (2013) (peer reviewed).

⁷ Only two participants who were approached to offer assistance refused. Both of those participants were removed from the study. See Dervan and Edkins, *The Innocent Defendant’s Dilemma*, footnote 6, at 29.

⁸ See Dervan and Edkins, *The Innocent Defendant’s Dilemma*, footnote 6.

Professor Richard Leo begins the collection with an analysis of the shifting meaning of “innocence” in American scholarship over the last few decades. His analysis of the concepts of “factual innocence” and “exoneration” sets the stage for the innocence issues discussed in the remaining pieces. As Professor Leo states in his essay, “How we define innocence and classify wrongful convictions matters, both empirically and normatively.”

Professor Meghan Ryan’s essay delves into the issue of the reliability of evidence and tactics during criminal proceedings and discusses the relationship between these concerns and wrongful convictions. Professor Ryan argues that those involved in the criminal justice system must “recognize and embrace their own fallibility.” Through such a recognition, she argues, a more critical examination of the system might occur.

Professor Valena Beety examines the issue of scientific evidence and argues that wrongful convictions reveal significant issues regarding a “disconnect between forensic experts and officers of the court on scientific understanding and scientific ignorance.” In particular, Professor Beety discusses several examples of unreliable scientific evidence being admitted against defendants with little challenge from the bench or bar because of a “gap in knowledge.”

Professor Gregory Gilchrist returns the discussion to plea bargaining and discusses the role of prosecutors and prosecutorial discretion in plea bargaining’s innocence issue. In an attempt to add greater transparency and accountability to the plea bargaining machine, Professor Gilchrist proposes the creation of a public review platform for the prosecutorial function. He writes, “If nothing else, exposure sustains public deliberation that itself might lead to better practices over time.”

Finally, Professor William Berry examines how we might better learn from wrongful convictions and how we might better move forward after injustice is discovered. Professor Berry offers a restorative model of punishment as a means of addressing both goals, while simultaneously “hold[ing] individuals who contribute to wrongful convictions accountable.” Through such a model, argues Professor Berry, a mechanism will exist for the wrongfully convicted to express themselves, for those involved in the conviction to offer an apology, and for the system as a whole to learn from the mistakes that have led to innocence issues.

Through these diverse and innovative essays, the reader is able to glimpse the larger innocence discussion that occurred in the summer of 2015. As occurred at the roundtable event, the ideas expressed in these pages begins a journey into an issue with many faces and many paths forward for discussion, research, and reform.

I. What Innocence Means Today and Why It Matters⁹

Richard A. Leo

In 1989 David Vasquez and Gary Dotson were, respectively, the first and second American prisoners to be exonerated by forensic DNA testing. A quarter of a century later, more than three hundred and thirty innocent men and women have been released from prison sentences after being exculpated by post-conviction DNA testing, including almost two dozen individuals from death row.¹⁰ The use of DNA to establish factual innocence in case after case has dramatically changed the landscape of American criminal justice. Among other things, it has shattered the “myth of infallibility,”¹¹ created “innocence consciousness,”¹² and inspired a number of policy reforms at the local, state and national level that are designed to reduce the likelihood of future wrongful convictions.¹³ The DNA exoneration cases, and the sustained media coverage many of them have received for over two decades, have also given rise to an innocence movement that has now become international.¹⁴ Some scholars have gone so far as describe the innocence revolution in American criminal justice as the “civil rights movement of the twenty-first century,”¹⁵ though others have disputed this categorization.¹⁶

American scholarship on the wrongful conviction of the innocent predates the use of forensic post-conviction DNA testing by more than a half-century. Yale law professor Edwin Borchard is typically credited with starting the empirical study of wrongful convictions with his 1932 book *Convicting the Innocent*, which described sixty-five cases of individuals who had been convicted but were subsequently proven factually innocent. Following the blueprint created by Borchard, subsequent writers and scholars of wrongful conviction also focused only on cases of completely factually innocent individuals. This included Erle Stanley Gardner’s *The Court of Last*

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¹⁰ <http://www.innocenceproject.org/> (Last accessed October 3, 2015)

¹¹ Keith Findley, *Defining Innocence*, 74 ALBANY L. REV. 1157 (2010/2011)

¹² Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALBANY L. REV. 1465, 1484 (2010/2011)

¹³ Robert Norris (2015). *The “New Civil Rights”: The Innocence Movement and American Criminal Justice*. Doctoral Dissertation, University of Albany, SUNY. Filed on May 2, 2015.

¹⁴ Keith Findley, *Innocence Found: the New Revolution in American Criminal Justice*, in Sarah Lucy Cooper, ED, *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* (2014)

¹⁵ Daniel Medwed, “Innocentrism,” U. ILL. L. REV (2008) at 1550.

¹⁶ See Norris Supra Note 13.

Resort (1952) [eighteen cases],¹⁷ Barbara and Jerome Frank's (1957) *Not Guilty* [34 cases],¹⁸ Edward Radin's (1964) *The Innocents* [80 cases],¹⁹ and a chapter by Hugo Bedau (1964) in *The Death Penalty in America* [74 Cases].²⁰ In 1987, Hugo Bedau and Michael Radelet published the largest compilation of wrongful cases in the pre-DNA era – 350 (capital and potentially capital) cases in America from 1900 to 1985.²¹ Like those before them, Bedau and Radelet focused only on factual innocence (i.e., “wrong man” errors, which they contrasted to “due process” errors).²²

Although many cases of the wrongful conviction of the innocent were documented and written about by scholars, journalists, lawyers and others in the pre-DNA era, these cases were either ignored or treated as individual tragedies, one-offs, rather than as illustrative of a criminal justice system that was structurally and persistently prone to factual error. The DNA exoneration cases in the 1990s and 2000s, of course, changed everything. When Barry Scheck and Peter Neufeld conceived the Innocence Project and the use of post-conviction DNA testing to free the wrongly convicted, however, they were conceptually part of the tradition of innocence scholarship and activism from Borchard to Bedau and Radelet. Their focus too was exclusively on “wrong man” errors or actual innocence, the title of their best-selling 2000 book.²³ To this end, Scheck and Neufeld introduced into the American lexicon the concept of a DNA exoneration, carefully making it synonymous with proof of actual innocence.²⁴

But an exoneration ordinarily is not proof of factual innocence, with or without the use of post-conviction DNA testing. An individual may be factually innocent but never be exonerated (e.g., if he or she is wrongfully convicted for a crime that never occurred or was committed by someone else, and was never released from prison), just as an individual may be exonerated (e.g.,

¹⁷ Erle Stanley Gardner, *THE COURT OF LAST RESORT* (1952)

¹⁸ Barbara and Jerome Frank, *NOT GUILTY* (1957)

¹⁹ Edward Radin, *THE INNOCENTS* (1964)

²⁰ Hugo Bedau, *Murder, Errors of Justice, and Capital Punishment* in Hugo Bedau, *THE DEATH PENALTY IN AMERICA* (1964) at 434.

²¹ Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *STAN. L. REV.* 21 (1987).

²² *Id.* at 42.

²³ Barry Scheck et al., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

²⁴ As Keith Findley has “The Innocence Project’s list of DNA exonerees is a carefully guarded list that does not admit everyone whose conviction has been erased, even if the case includes favorable DNA evidence. Rather that list... admits only those whose convictions have been overturned *primarily* on the basis of DNA evidence, and where the DNA *conclusively* prove innocence.” Findley, *Supra* Note 11 at 1187.

declared blameless by the criminal justice system) but be factually guilty. Yet in the last decade, the term “exoneration” appears to have become virtually synonymous with factual innocence to most scholars, even in cases not involving DNA testing and exculpation. As factual innocence is being replaced by a narrow definition of legal exoneration that is a proxy for factual innocence, the meaning of innocence has shifted in American scholarship. This shift is important for understanding the causes, consequences, and scope of the problem of wrongful conviction, as well as for more informed policy discussions.

To my knowledge, the first use of the term “exoneration” as a proxy for factual innocence absent DNA occurred in 1993 when the Death Penalty Information Center in Washington D.C. prepared a congressional report on the risks of executing the innocent, including a compilation of cases from the prior twenty years in which death row inmates had been released from prison following an acknowledgement of their innocence.²⁵ Although it turned to the research of Bedau and Radelet, the Death Penalty Information Center replaced Bedau and Radelet’s definition/classification of actual innocence with the idea of an exoneration, which they defined as “Defendants must have been convicted, sentenced to death and subsequently either-A. Been acquitted of all charges related to the crime that placed them on death row, or B. Had all charges related to the crime that placed them on death row dismissed by the prosecution, or C. Been granted a complete pardon based on evidence of innocence.”²⁶ The Death Penalty Information Center classified a case fitting these criteria as an “exoneration” because the prisoner’s presumption of innocence was effectively restored by the erasure of his initial capital conviction, which, they argued, had thus been wrongful. According to the Death Penalty Information Center, the defendant was innocent because the legal system had cleared him of the crime that had sent him to death row. The Death Penalty Information Center’s list of exonerations were thus based not on a demonstration of *factual* innocence but on an erasure of a pre-existing conviction that restored the defendant’s *legal* presumption of innocence. In redefining innocence, the Death Penalty Information Center believed it was replacing “subjective judgments” with “objective criteria,”²⁷ even though its definition of a death penalty “exoneration” clearly reflected its own value choices and judgments.

The list of DNA exonerations maintained by the Innocence Project (since 1992) and the list of death penalty exonerations maintained by Death Penalty Information Center (since 1993) were, “for most of the last twenty years, the most oft-cited and ‘official’ of exoneration lists.”²⁸ In 2005, Samuel Gross and his colleagues effectively merged these two lists in their influential law

²⁵ Norris Supra Note 13.

²⁶ <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (Last accessed September 17, 2015)

²⁷ <http://www.deathpenaltyinfo.org/innocence-and-crisis-american-death-penalty#Sec05a>.(Last accessed September 17, 2015).

²⁸ Norris, Supra Note 13 at 135.

review article, “Exonerations in the United States, 1989 through 2003,”²⁹ analyzing 340 exonerations in the DNA era. However, Gross’ criteria for what constituted an exoneration more closely tracked the Death Penalty Information Center’s.³⁰ Like the list maintained by the Death Penalty Information Center, Gross’ list was based on the idea of a *legal* exoneration – an erasure of a pre-existing conviction. But Gross adds that the legal reversal must be based on some new evidence of innocence, though he does not specify what counts as new evidence of innocence or how much is necessary. Indeed, Gross and his colleagues noted that, “Needless to say, we are in no position to reach an independent judgment on the factual innocence of each defendant in our data,”³¹ though they only counted among their exonerations legal erasures of pre-existing convictions that were accompanied by some new evidence of innocence.

Building on his 2005 study, Gross – along with Rob Warden – in May 2012 launched the National Registry of Exonerations -- an online data base of exonerations in the United States since 1989 that is housed at the University of Michigan Law School – with nearly 900 cases. It now lists 1,700 cases.³² In little more than 3 years, the National Registry has become the authoritative source on wrongful convictions in our era, dwarfing the Innocence Project’s current list of 330 DNA exonerations. The National Registry currently lists more than 5 times as many non-DNA exonerations as DNA exonerations, and the ratio continues to grow. It has become the largest “official” database of American wrongful convictions. The National Registry’s definition of an exoneration for the most part tracks the definition provided in Sam Gross and colleagues’ 2005 article, but is slightly more expansive.³³

²⁹ Samuel Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005)

³⁰ *Id.* at 524.

³¹ *Id.* at 526.

³² <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (Last accessed October 3, 2015).

³³ According to their website, “*In general, an **exoneration** occurs when a person who has been convicted of a crime is officially cleared based on new evidence of innocence.*” *More specifically:* “A person has been exonerated if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant, the defense attorney and the court at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person.” <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (Last accessed on October 3, 2015).

How we define innocence and classify wrongful convictions matters, both empirically and normatively. Given the inherent difficulty of proving a negative, it is almost impossible to demonstrate a person's factual innocence – i.e., that the defendant was the wrong man or that no crime occurred -- to an absolute certainty in many cases. For this reason, it must be true that the number of proven wrongful convictions of the innocent is vastly smaller than the number of actual wrongful convictions of the innocent.³⁴ Although innocence-based exonerations are not the only or the most conservative way to study innocence, they are nevertheless a valuable proxy or indirect measure. The primary advantage of the National Registry's innocence-based definition of an exoneration is that it allows researchers access to a greater amount of valuable data – about the regularity, distribution, causes, correlates and consequences of near-certain wrongful convictions of the innocent -- than would otherwise be available if we limited ourselves solely to those comparatively few cases in which we can prove factual innocence to an absolute certainty. There is a justifiable trade-off here between marginally greater confidence in our judgment of actual innocence on the one hand (if we rely on proven wrongful convictions exclusively) and substantially more information about the multi-faceted phenomenon of the wrongful conviction of the innocent on the other (if we rely on the Registry's innocence-based exonerations as a proxy for false convictions).

Moreover, by relying on an innocence-based definition of exonerations, researchers are able to empirically study patterns and variation in the wrongful conviction of the innocent more quantitatively and thus more systematically, moving away from the story-based explanations that have heretofore dominated much of the research literature on wrongful convictions and inevitably present problems of generalizability.³⁵ As the ever-expanding list of DNA exonerations demonstrated in the 1990s and 2000s, the problem of the wrongful conviction of the innocent in the American criminal justice system is persistent and systemic, not merely episodic and aberrational as critics had mistakenly claimed.³⁶ As the empirical research community is able to accumulate more systematic and generalizable knowledge about the various factors that contribute to the wrongful conviction of the innocent in the 2010s and beyond, we will be able to gain a better understanding of the nature and the scope of the wrongful convictions of the innocent in America. And therefore we will be able to provide more empirically informed policy analyses about the best ways to prevent and minimize them in the future.

³⁴ As Sam Gross has argued, "Any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands." Gross *Supra* Note 29 at 551.

³⁵ See Richard A. Leo and Jon Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 *OHIO ST. J. CRIM. L.*, 7 (2009).

³⁶ See e.g., Joshua Marquis, *The Myth of Innocence*, 95 *J. CRIM. L. & CRIMINOLOGY* 501 (2005)

II. INNOCENCE IGNORANCE: THE FAILURE TO ACKNOWLEDGE THE FALLIBILITY AND DIGNITY COMPONENTS OF HUMANITY

Meghan J. Ryan

On March 24, 1985, a young female college student from Texas Tech University was brutally raped. The primary suspect, Timothy Cole, was soon picked out of a questionable photo array and charged with aggravated sexual conduct. At trial, the victim identified Cole as the perpetrator, and the prosecution also proffered inconclusive serology and hair analysis testimony. After six hours of deliberation, the jury convicted Cole, and he was sentenced to twenty-five years in prison. After spending a decade in prison, Cole passed away. Some time later, another Texas inmate confessed to the rape for which Cole had been convicted. In fact, even while Cole was still alive, this confessor had admitted to the rape, but this prior confession had received little attention. On the heels of the later confession, DNA analysis was found to exculpate Cole and inculpate the confessor. Cole was then legally exonerated in 2009 and subsequently pardoned in 2010. Troublingly, it seems that Cole spent over a decade in prison—and in fact died in prison—for a crime he did not commit.

Unfortunately, Cole's story is not unique. There have been at least 1,748 documented wrongful convictions in the United States since 1989.³⁷ Many of these wrongful convictions have been the products of false or misleading evidence, while others resulted from questionable prosecutor actions or other curable sources of error. Yet questionable evidence and tactics continue to penetrate courts across the country. The FBI recently admitted giving flawed hair analysis testimony in over 95% of cases in which hair analysis testimony has been presented.³⁸ The National Academy of Sciences has explained that fingerprint evidence, which is routinely used in cementing criminal convictions, has no scientific basis.³⁹ And the Texas Forensic Science Commission has found that the arson evidence on which numerous convictions have been based, is pure poppycock. Further, common reactions to the innocence problem include remaining ignorant of it, denying its existence, or maintaining passive in efforts to address it. The statistics can be paralyzing. But it is important to acknowledge the enormity of the problem and also recognize that we do have the capability to better address it. Confronting and attacking the concern of wrongful conviction requires recognizing the essence of humanity—both the human dignity of the defendants and the human fallibility of the legal decisionmakers who decide their fates.

³⁷ See *The Nat'l Registry of Exonerations*, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={b8342ae7-6520-4a32-8a06-4b326208baf8}&SortField=Exonerated&SortDir=Asc> (last visited Mar. 7, 2016).

³⁸ See Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, WASH. POST, Apr. 18, 2015, https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html.

³⁹ See NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).

The many recent examples of wrongful and doubtful convictions have seemed overwhelming. Some known potential sources of wrongful convictions have been more readily challenged in recent years. For example, courts have been willing to admit into evidence expert testimony on the pitfalls of eyewitness testimony, and some states such as New York and Texas have established forensic science commissions to remain abreast of scientific developments affecting forensic evidence used in court. But much of the evidence used to convict criminal defendants could use better factual and scientific support. Despite broad recognition that much of the evidence presented in criminal trials—from eyewitness testimony, to arson evidence, to fingerprint evidence—may be unreliable or at least that there is no scientific evidence of reliability, there has not been enough progress in trying to stamp out these possible sources of error at trial. Further, trial and appellate courts are often skeptical when questions about the reliability of convicting evidence is raised in post-conviction proceedings. There are significant obstacles that convicted defendants must negotiate if they want to challenge their convictions that have become final on appeal. For example, the Antiterrorism and Effective Death Penalty Act of 1996 has significantly narrowed the cases in which convicted defendants may successfully challenge their convictions on writs of habeas corpus.

When legal decisionmakers are confronted with all of the concerns surrounding wrongful and doubtful convictions, they have a variety of responses. Some judges are eager to learn more. They want to know how to better screen for reliable scientific evidence and how to better use the law to prevent the injustice of wrongful conviction. This sometimes leads them to conduct their own independent research, which may have its own ethical implications. Other judges deny that there is a problem. They emphasize the small percentage of convicted defendants who have been exonerated and assert that the fact exonerations have taken place establishes that there are ways for the system to correct itself if need be. Still other judges feel overwhelmed or powerless—because of the enormity of the problem, the startling statistics, or that such an injustice could happen under our orderly rule of law in this country. Indeed, research suggests that statistics about large numbers of humans suffering—like the million who were killed in the Rwandan genocide of 1994—have a numbing effect.⁴⁰ People are more likely to have compassion for, and respond to, the single story of a suffering individual than hundreds of thousands who were unjustly killed in the same way. The story of Timothy Cole may resonate more with the public, and thus have greater power, than reciting that there may be thousands of people unjustly behind bars today.

To better protect innocent persons in the criminal justice system, judges and other legal decisionmakers must recognize and embrace their own fallibility. They are human and will thus occasionally make mistakes. As integral components of the criminal justice system, though, these decisionmakers do have the power to change things. But change will require a cultural shift. Legal decisionmakers must be open to possible defects within the system—including the evidence on

⁴⁰ See Paul Slovic, “*If I Look at the Mass I Will Never Act*”: *Psychic Numbing and Genocide*, 2 JUDGMENT AND DECISION MAKING 79 (2007); David Ropeik, *Statistical Numbing: Why Millions Can Die and We Don’t Care*, PYSCH. TODAY, Aug 15, 2011, <https://www.psychologytoday.com/blog/how-risky-is-it-really/201108/statistical-numbing-why-millions-can-die-and-we-don-t-care>.

which convictions are based and even the appellate standards of review. They must also be willing to embrace what science and experience tell us. Just because fingerprint evidence has been relied upon for hundreds of years, for example, does not necessarily mean that it constitutes reliable evidence. Legal decisionmakers will also need to harness their power and push for change. If legal decisionmakers are competent in their understandings of the problems within the system and also confident that they are correct in those assessments, they have the power to create change. In fact, legal decisionmakers—especially judges—may have the greatest power of any player in this regard. They are legal insiders and are trusted to safeguard the integrity of the system for the rest of society.

For change to occur, it is also important that judges and other legal decisionmakers recognize that, even if the percentage of individuals wrongfully convicted is small, wrongful conviction is still an enormous problem. Surely, as recognized by our beyond-a-reasonable-doubt rule, certainty of guilt would be an impossible standard. Certainty is unobtainable. But imprisoning—or worse, executing—an innocent individual, no matter how rare that might be, is abominable. To lock up individuals and throw away the keys—to stop thinking about them as human beings—is problematic. This is true even for the most serious offenders who have committed the most heinous of crimes. Not only is it inconsistent with basic principles of morality, but it contravenes the human dignity principle of the Eighth Amendment prohibition on cruel and unusual punishments. As the Supreme Court has stated time and time again, “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁴¹ These are *people*. It does matter if an innocent individual is behind bars. Although certainty may not be obtainable, what is obtainable is trying to make convictions as reliable as possible. This means basing convictions on only reliable evidence and maintaining high ethical standards for prosecutors and defense attorneys.

Recognizing human dignity and fallibility are two important cornerstones for the innocence movement. Individualized critical analyses—of facts, of evidence, of cognitive and implicit biases—are essential in preserving these values. Only when we embrace these foundations of reliability in criminal convictions can we begin to effectively address the serious concern of wrongful conviction.

⁴¹ *E.g.*, *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

III. Forensic Ignorance on Trial

Valena E. Beety

*“Science is a court from which there is no appeal.”*⁴²

Recently, a New York Times op-ed argued the case for teaching ignorance—scientific ignorance.⁴³ The two words read as incongruent, and not simply to lay people. The op-ed describes medical students who study and memorize diagrams, descriptions, and definitions, a robust background of scientific information.⁴⁴ What the young doctors fail to learn is how much remains unknown, even for scientists and physicians.⁴⁵

Identifying gaps in knowledge is particularly vital for scientific disciplines, which are often assumed to be impartial and all-knowing. Courts in particular rely on scientific findings for conclusive results and impartiality. It is no surprise, therefore, that a lack of scientific questioning has led directly to wrongful convictions in our criminal justice system.⁴⁶ These wrongful convictions highlight two primary problems with the disconnect between forensic experts and officers of the court on scientific understanding and scientific ignorance. This essay will discuss two interrelated issues: the lack of standard protocols and standardized language in forensic disciplines, and the exacerbation of this problem by court officers who encourage simplified language, leading witnesses to misrepresent their findings.

The National Academy of Sciences criticized the lack of standard protocols for forensic disciplines in its pivotal 2009 report, *Forensic Sciences: A Path Forward* (“NAS Report”).⁴⁷ Of the many forensic disciplines, only one was found infallible and was using a repeatable, cognizable

⁴² Tom Wolfe, *Sorry, but your Soul just Died*, INDEPENDENT (FEBRUARY 2, 1997), <http://www.independent.co.uk/arts-entertainment/sorry-but-your-soul-just-died-1276509.html>.

⁴³ Jamie Holmes, *The Case for Teaching Ignorance*, NY TIMES (August 24, 2015), http://www.nytimes.com/2015/08/24/opinion/the-case-for-teaching-ignorance.html?ref=opinion&_r=0.

⁴⁴ *Id.*

⁴⁵ As University of Arizona surgery professor Marlys Witte notes in the article, “Textbooks spend 8 to 10 pages on pancreatic cancer . . . without ever telling the student that we just don’t know very much about it.” *Id.*

⁴⁶ See, e.g., Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis over Decades*, WASH. POST (APRIL 18, 2015), https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html.

⁴⁷ See THE NATIONAL ACADEMY OF SCIENCES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), <http://www.nap.edu/catalog/12589/strengthening-forensic-science-in-the-united-states-a-path-forward> [hereinafter A PATH FORWARD].

standard of operation: DNA testing. When disciplines lack a standard operating procedure, no evidence exists to show the repeatability of a procedure, no established population pool exists to compare results, and no validation studies exist to support the effectiveness of the technique. In short, the lack of knowledge—or ignorance—is palpable across forensic disciplines.

Just how broad is the gap of accuracy and consistency between forensic findings and what is presented in the courtroom? Forensic Odontology, or bite mark analysis, offers an example of how an unregulated, non-standardized field can produce faulty findings that are used to wrongfully convict innocent men and women. Forensic Odontology is generally admitted in the courtroom to determine if marks on skin are human bite marks, and then to “match” those markings to a suspect’s teeth mold.⁴⁸ With no standard (even when the American Board of Forensic Odontology conducted their own internal study in 2015) forensic odontologists fail to agree on whether a marking is even a human bite mark. This failure to make a consistent determination means a marking is likewise not unique enough to identify an individual.⁴⁹ With no consistent method of determination, and no consistent validation of a method, markings cannot be reliably identified as bite marks, let alone matched to a suspect. Despite its unreliability, prosecutors have used bite mark evidence to wrongfully convict individuals nationally, most notably: Kennedy Brewer, Levon Brooks,⁵⁰ Leigh Stubbs, Tami Vance,⁵¹ and Robert Lee Stinson.⁵² This unreliable evidence continues to be used and admitted in the courtroom today.⁵³

Yet the admittance of unreliable forensic evidence in the courtroom, often without challenge, is only part of the problem. Prosecutors seek to dumb down findings from many forensic disciplines, ultimately misrepresenting results. The NAS Report found that no forensic discipline, except DNA analysis, could make an exact match or “individuate.” And yet an “exact match” is precisely the language often used to describe such findings by prosecutors in the

⁴⁸ Steven Weigler, *Bite Mark Evidence: Forensic Odontology and the Law*, 2 HEALTH MATRIX 303, 304 (1992).

⁴⁹ Radley Balko, *A Bite Mark Matching Advocacy Group Just Conducted a Study that Discredits Bite Mark Evidence*, WASH. POST (April 8, 2015) <http://www.washingtonpost.com/news/the-watch/wp/2015/04/08/a-bite-mark-matching-advocacy-group-just-conducted-a-study-that-discredits-bite-mark-evidence/>.

⁵⁰ *Two Innocent Men Cleared Today in Separate Murder Cases*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news-events-exonerations/press-releases/two-innocent-men-cleared-today-in-separate-murder-cases-in-mississippi-15-years-after-wrongful-convictions> (Feb. 15, 2008).

⁵¹ *Leigh Stubbs/Tami Vance*, MISSISSIPPI INNOCENCE PROJECT, <http://mississippiinnocence.org/case/leigh-stubbstami-vance/> (Date Last Accessed, Aug. 7, 2015).

⁵² *State v. Stinson*, 397 N.W.2d 136 (Wisc. Ct. App. 1986).

⁵³ Indeed, Robert Stinson’s wrongful conviction created the national standard of general acceptance of bite mark evidence, still relied on by courts today in admitting bite mark evidence. *Id.*

courtroom.⁵⁴ Even with DNA evidence, a recent study has shown the majority of wrongful DNA matches and errors originated in the *post-analytical stage* – when the experts were explaining the reports.⁵⁵

Forensic disciplines can be extremely valuable in eliminating suspects. They are less reliable, however, in directly implicating a particular defendant. Nevertheless, prosecutors may push for exact match language from an expert, leading the expert to say the hair belonged to the defendant, that the expert is 100% positive in the match, or even that there is no way the hair could have matched any other person but the defendant.⁵⁶ While such language is persuasive to a jury and acceptable to a judge, it has been proven to be scientifically inaccurate. Worse, when defense attorneys – like prosecutors – fail to understand the nuances of forensic science disciplines and reports, exact match testimony is admitted without so much as a challenge.

The FBI has recently conceded how its own scientists' faulty testimonial rhetoric wrongfully convicted individuals.⁵⁷ In re-opening thousands of hair analysis cases, the FBI reveals that its analysts testified far beyond the scope of the science, falsely testifying to exact matches.⁵⁸ Simplified exact matches are what juries want to hear, prosecutors want to produce, courts are willing to accept, and defense attorneys rarely challenge. Yet this overblown faulty language wrongfully convicts individuals in the American criminal justice system. Questionable results are misrepresented as accurate, reliable, and impartial, and then accepted as such by jurors and judges alike.

Forensic scientists themselves have responded to reliability challenges by working to strengthen the accuracy of their disciplines. In 2014, the National Institute of Standards and Technology established 23 Organization of Scientific Area Committees (SACs) to research the reliability of forensic disciplines and methods, conduct validation studies of these methods and techniques, and create a standard operating procedure for each specific forensic discipline.⁵⁹ In

⁵⁴ Bennett L. Gersham, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 24 (2003).

⁵⁵ Ate Kloostroom, *Framework for Registration, Classification and Evaluation of errors in the Forensic DNA Typing Process*, Netherlands Forensisch Instituut (May 2014), available at <http://www.nist.gov/forensics/upload/Kloosterman-DNA.pdf>.

⁵⁶ *See id.*

⁵⁷ Hsu, *supra* note 46.

⁵⁸ Stephen S. Hsu, *After FBI Admits Overstating Forensic Hair Matches, Focus Turns to Cases*, WASH. POST (APRIL 20, 2015), https://www.washingtonpost.com/local/crime/after-fbi-admits-overstating-forensic-hair-matches-focus-turns-to-cases/2015/04/20/a846aca8-e766-11e4-9a6a-c1ab95a0600b_story.html.

⁵⁹ *See Scientific Working Groups*, NIST: LAW ENFORCEMENT STANDARDS OFFICE, http://www.nist.gov/oles/forensics/scientific_working_groups.cfm.

addition to newly created standards of operation, forensic scientists must also consistently describe their findings in reports.

Notably, consistent language in reports can assist courts in understanding the value, accuracy, reliability, and importance of forensic findings. Terminology can vary across reports, inadvertently heightening the communication barrier between forensic experts and attorneys. In *Melendez-Diaz*,⁶⁰ the Supreme Court refused to allow a lab report to stand on its own as courtroom evidence, instead requiring a lab technician testify to the results, thus reducing the possible manipulation or misinterpretation of report findings.⁶¹ Having the analyst testify to the results is seen as a protective measure. Yet until courtroom officers accept nuance in scientific testimony and acknowledge the unknown in scientific determinations, even reliable forensic findings will be misrepresented.

The gaps in knowledge in forensic science may be an exciting challenge similar to the less-identified gaps in other sciences. The alternative of hiding scientific ignorance leads to the willfully blind use of faulty evidence to wrongfully convict defendants. By both establishing standards and reliability metrics for forensic disciplines, and standardizing the language in reports, reliable science can be useful in the courtroom. For that evidence to then be accurately presented, lawyers and scientists need to acknowledge the limits of the science, accept and appreciate the nuance of findings, and use the results to their utmost ability, but not beyond. With these steps we can avoid the harrowing result of misrepresentation by either science or the court: wrongful convictions.

⁶⁰ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

⁶¹ *Id.* at 311.

IV. Reviewing the Prosecution

Gregory M. Gilchrist

This brief essay isolates and considers two variables in the innocence problem: unchecked prosecutorial discretion and unregulated plea bargaining. It tentatively suggests a mechanism to address the former.

a. Prosecutors Have Nearly Unlimited Discretion Over Plea Bargaining

Few government actors exercise as much power over the lives of others as prosecutors. Prosecutors decide whether to seek charges, what charges to seek, whether to offer leniency, how much leniency to offer, how to try a case, and what sentence to request upon conviction. This discretion is as unchecked as it is broad.⁶² The courts view prosecutorial decisions with extreme deference.⁶³ Elections fail to provide a meaningful check.⁶⁴ Internal checks, such as the Office of Professional Responsibility, seem largely ineffective.⁶⁵ And rules of professional conduct are limited in scope and even more limited in application.⁶⁶

There is something troubling about entrusting individuals with expansive and largely ungoverned power over charging decisions. Who loses life and liberty at the hands of the state is largely determined by individual discretion. Such a condition is, if nothing else, at odds with the rule of law and subject to abuse.

b. Plea Bargaining Exacerbates the Innocence Problem

As I have argued elsewhere, given sufficient disparities between post-plea sentences and post-trial sentences, the effective burden of proof for the prosecution can be reduced to mere probable cause.⁶⁷ If we imagine a prosecutor who could credibly threaten a death sentence after

⁶² See e.g. Ronald F. Wright, *Beyond Prosecutor Elections*, 67 S.M.U. L. Rev. 593 (2014); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors*, 61 Stan. L. Rev. 869 (2009).

⁶³ See e.g. *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

⁶⁴ See Ronald F. Wright, *How Prosecutorial Elections Fail Us*, 6 Ohio St. J. Crim. L. 581 (2009).

⁶⁵ Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L. J. Ann. Rev. Crim. Proc. iii, xxxii (2015) (“In my experience, the U.S. Justice Department’s Office of Professional Responsibility (OPR) seems to view its mission as cleaning up the reputation of prosecutors who have gotten themselves into trouble.”).

⁶⁶ See David Keenan, Deborah Jane Cooper, David Lebowitz and Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson; Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, The Yale Law Journal Online, October 25, 2011.

⁶⁷ See Gregory M. Gilchrist, *Trial Bargaining*, 101 Iowa L. Rev. 609, 632 (2016).

trial, while offering a fine of fifty cents if the defendant pleads guilty, it is difficult to imagine a rational defendant risking trial.⁶⁸ Even were the prosecution's case extremely weak, risking death to avoid a conviction and a fifty-cent fine would be, in most cases, foolhardy. Given a sufficient trial penalty, rational defendants will be forced to plead guilty, even if they are in fact innocent.⁶⁹ In that case, the charging decision is the only check on the prosecution, and the only limit on that decision is probable cause.⁷⁰ Accordingly, with mere probable cause, the prosecutor can secure a conviction in almost all cases.

Of course, in our legal system there are no sentencing disparities as great as that imagined above. No one is forced to risk death in order to dispute a fine. There are, however, extraordinary trial penalties. It is not uncommon in federal gun and drug cases for a defendant to face post-trial sentences of ten, twenty, thirty years, or even life, while being offered a plea agreement likely to result in a sentence of only a few years in prison. In these cases too there is a real risk that rational defendants will be compelled to plead guilty, even where the prosecution's case is weak. And, again, this risk applies equally to the guilty and the innocent.

Through widespread and unregulated plea bargaining, we have significantly diluted the protection inherent in the proof beyond a reasonable doubt requirement. Very few cases are tested by this standard. Defendants plead guilty and some of those defendants are innocent.

The dangers of plea bargaining are elevated by unchecked prosecutorial discretion. The charging decision is frequently outcome determinative. Since that decision is unchecked, little more than trust separates citizens from wrongful convictions generated by wrongful charges and coercive pleas.

c. Rating Prosecutors

Accountability matters. Insofar as institutional forms of review have failed to provide accountability, we are left searching for an alternative. What about public review? Professor Ronald Wright has recently proposed developing a rating system of prosecutors, in order to develop a feedback loop between prosecutors and their communities.⁷¹ He envisions an independent entity, such as a news organization, gathering objective data on prosecutorial practices and publishing a Prosecutor Quality Index. Data points might include conviction rates, conviction-as-charged rates, and acquittal rates. The study and publication of prosecutorial practices would

⁶⁸ See John H. Langbein, *Torture and Plea Bargaining*, 46 U. Chi. L. Rev. 3, 13, n. 34 (1978).

⁶⁹ See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty>.

⁷⁰ See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

⁷¹ See Ronald F. Wright, *supra* note 62, at 608-615.

itself bring attention to prosecutorial practices, generate public deliberation, and serve as a check against prosecutorial excesses.

Professor Wright's proposal presents a potential solution to – or at least mitigation of – what has long seemed the insurmountable problem of prosecutorial discretion.

What if this idea, however, were democratized?

Technological shifts have already introduced new tools for regulating prosecutors. In a forthcoming article, Bruce Green and Ellen Yaroshefsky make a compelling case that a new age of prosecutorial accountability that could not have been achieved “without the aggregation, accessibility, and communication of data and commentary about prosecutorial misconduct that new information technology makes readily available to the public.”⁷²

Technology introduces the possibility of a radical new form of prosecutorial review. Rather than a centralized and objective review, what if prosecutors were subject to a more public review? Social media allows the public to review hotels, restaurants, professors, and even government agencies online.⁷³ Why not prosecutors? If the public could review the prosecutorial function, might not that review have the same salutary effects envisioned by Professor Wright?

It's hard to know. First, there is the question of what the dataset would look like. Who would review prosecutors? A truly open review platform would likely degenerate into complaints – both valid and invalid – by those convicted by a prosecutor. Such a dataset would have limited, if any, informational value. Perhaps the most promising possibility would be a review platform on which only defense counsel with professional interactions with a particular prosecutor could generate reviews, but on which completed reviews would be completely public.⁷⁴

Were such a platform to generate a robust set of data, one could imagine any number of audiences. Prosecutors would likely be interested, themselves. Defense attorneys confronting a prosecutor for the first time would benefit from the experience of other attorneys. Judges may wish to learn more about the lawyers bringing cases in their courtrooms. Law firms would likely review the data when hiring out of prosecutors' offices. And one might even imagine senior

⁷² Bruce A. Green and Ellen Yaroshefsky *Prosecutorial Accountability 2.0*, Notre Dame Law Review (forthcoming 2016) available at SSRN:<http://ssrn.com/abstract=2722791> or <http://dx.doi.org/10.2139/ssrn.2722791>.

⁷³ See Lisa Rein, *The federal government wants you to review it on Yelp*, Wash. Po., Aug. 18, 2015, available at <http://www.washingtonpost.com/blogs/federal-eye/wp/2015/08/18/the-federal-government-wants-you-to-review-it-on-yelp/>.

⁷⁴ There are significant hurdles any such project would face. The fundamental challenge lies in dual needs to limit access for authoring reviews to actual defense lawyers with personal knowledge of the prosecutor, while at the same time providing absolute anonymity to the reviewers. This challenge is basically a technical one and beyond the scope of this brief essay, except to suggest that the solutions themselves may also be technical.

officials at the Department of Justice or other prosecutorial agencies considering the reviews when making promotion decisions. Finally, the public itself would learn more about prosecutors and the prosecutorial function.

One might object that reviews by defense counsel would surely be biased. Surely. But bias does not render reviews unhelpful, especially when the bias is plain. Yes, everyone would know that defense lawyers were reviewing their adversaries. The value would develop as disparities between prosecutors became pronounced. Consider, as an example, a platform allowing ratings for:

- “Procedural Fairness” (e.g. provides Jencks before trial, tendency toward open file discovery, respectful of appointed counsel’s need to develop rapport with client, *et cetera*)
- “Ethical Conduct” (compliance with ethical obligations)
- “Outcome Fairness / Harshness” (an assessment of plea agreement and sentencing practices).

Any one review would have little informational value. But as means and extremes developed, the patterns might be useful. Some prosecutors are more fair, ethical, or decent, than others.⁷⁵ Simply observing the disparity would have an impact. The question remains, what impact would it have?

One possibility is that those prosecutors who received low scores or who were subject of harsh narrative reviews would change their practices for the better or face limited career advancement. Equally possible: those who received positive scores or reviews would change their practices for the worse or face limited career advancement. Which of these possibilities is more likely would depend largely on the culture of the relevant audience. In an office that highly values professionalism and the prosecutor’s special role as not merely an advocate, but a servant of justice, there would be pressure to maintain decent review scores (or, at least to avoid being a negative outlier). Yet in an office that highly values winning over all else, there might be pressure not to be perceived as soft or weak.

That we cannot predict the exact impact of a public review of the prosecution does not demand the conclusion that such a project lacks value. First, more information about government function is usually better than less. Professors Wright, Green, Yaroshefsky, and others are correct to see the value inherent in increased exposure of and attention to prosecutorial practices. If nothing else, exposure sustains public deliberation that itself might lead to better practices over time. Second, my experience has been that most prosecutors do value their special role as servants of justice. Sure, there are exceptions, and the prosecutor’s vision of justice does not always align with defense counsel’s, but I harbor cautious optimism that heightened exposure would lead to better behavior. And given the dearth of other reviewing bodies, the public may represent the best check against the otherwise unchecked prosecutorial function.

⁷⁵ Yes; the same could be said of defense lawyers, police officers, law professors, or any other group.

V. Restorative Innocence

William W. Berry III

It is better to risk saving a guilty man than to condemn an innocent one.

-- Voltaire

The long held sentiment with respect to the judging of those accused of criminal acts is that, all things being equal, it is better to let a guilty man go free than imprison an innocent man.⁷⁶ To be sure, the American criminal justice system provides for the presumption of innocence and places the burden on the state to prove guilt beyond a reasonable doubt.

And yet, in recent years, the discovery of innocent individuals in American prisons has reached epidemic proportions,⁷⁷ with over 125 individuals exonerated in the past year alone.⁷⁸ The availability of DNA evidence explains some of this phenomenon, although it does not make it any less disturbing.⁷⁹

In recent years, a number of studies have shed light on the reasons for these failings.⁸⁰ The hope of such study is to understand why these errors occur and to assess how to deter such mistakes in the future. Interestingly, there is a wide range of conduct, some intentional, some negligent, some coincidental, that leads to false convictions.

In addition to understanding why such errors occur, creating some consequence for such failings seems necessary. The problem with the current status quo is that there are few, if any, accountability measures for police, prosecutors, state forensic scientists, expert witnesses, eyewitnesses, jurors, and others whose decision-making contributed to the erroneous conviction of an innocent individual.⁸¹ Even so, the absence of such measures makes some sense, as allowing criminal punishment of such actors would largely chill their ability to do their jobs effectively.

⁷⁶ Blackstone similarly said, “It is better that ten guilty persons escape than that one innocent suffer.”

⁷⁷ One study identified over 900 exonerations since 1989. *See* exonerationregistry.org.

⁷⁸ *See* <http://www.washingtonpost.com/news/post-nation/wp/2015/01/29/record-number-of-exonerations-in-the-u-s-report-says/>.

⁷⁹ There have been 330 DNA exonerations. <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>.

⁸⁰ *See, e.g.,* BRANDON GARRETT, CONVICTING THE INNOCENT (2011); Samuel R. Gross, et al., *Rate of false conviction of criminal defendants who are sentenced to death*, 111 *PROCEEDINGS NAT’L ACAD. SCI. U. S.* 7230 (2014)(estimating over four percent of all death row inmates are innocent).

⁸¹ *Connick v. Thompson* illustrates this point. 563 U.S. ___ (2011) (striking down a multi-million dollar tort award against prosecutors who hid exonerating DNA evidence for death row inmate).

This short paper proposes a remedy to this conundrum by introducing a different form of accountability for actors who bear some responsibility for conviction of innocent individuals—implementation of restorative justice principles. As explained below, this approach helps those who have made mistakes understand the consequences of their actions and provides a public response on behalf of the falsely accused.

Instead of punishing a criminal offender by imprisonment to exercise the retributive power of the state, restorative justice, generally speaking, seeks to sanction the criminal offender through a process of re-integrative shaming. In such a proceeding, the victim meets with the offender in the presence of the local community. The victim communicates to the offender the pain and suffering caused by the offender's actions. In some cases, others from the community can also voice their displeasure or contempt for the actions of the offender.

Unlike ordinary sentencing hearings, which involve disintegrative shaming, the point of the restorative justice proceeding is not to separate the offender further from society through condemnation. Rather, the proceeding aims to reintegrate the offender into society.

After the public shaming, then, the offender has the opportunity to express remorse for his actions. The offender then asks the victim and the community for forgiveness for his actions. The community and the victim then absolve the offender, allowing him to rejoin society.

Many find the process objectionable for serious crimes, as it seems to abandon the hard punishment that many believe criminal offenders deserve. Interestingly, restorative justice has proved most successful in the context of particularly serious crimes such as genocide.⁸²

Two elements of restorative justice are particularly important—offering the ability of the victim to express their feelings toward the offender, and offering the offender the opportunity to express remorse toward the victim. A broader consideration also is the value of having the involvement of the broader community in this interaction, both to express condemnation of the criminal act as well as offer forgiveness and reintegration to the offender.

Putting aside whether restorative justice is an effective tool for responding to criminal offenses, this short paper argues for using these principles as a means to hold individuals who contribute to wrongful convictions accountable. This process of “restorative innocence” would work in much the same way as restorative justice does.

After a court exonerates an individual who had previously been falsely convicted, a separate proceeding would occur. As judges play a role in cases of false conviction, creating an independent commission to administer such a proceeding would be desirable. The restorative innocence commission would mandate the attendance of as many of the individuals who participated in the prior criminal proceeding as possible. This would include prosecutors, judges,

⁸² JOHN BRAITHWAITE, *CRIME, SHAME & REINTEGRATION* (1989).

jurors, expert witnesses, other witnesses, police, and any other individual who played a significant role in the false conviction.

The first part of the proceeding would be the falsely convicted individual speaking about his experience from the time of the criminal incident until exoneration. Having the opportunity for falsely convicted individuals to express their thoughts concerning their experience could be both cathartic and offer closure, particularly if many of those involved were present. It would likewise have the mutual benefit of helping those who were involved in the case an opportunity to witness the damage caused by their decision-making, irrespective of the level of fault they bore for the errors in the process that led to the false conviction.

The other participants would then have an opportunity to respond, offering apology and remorse, at least in some cases, to the falsely convicted. It would allow the opportunity, as well, for those who made mistakes, whether prosecutors, experts, eyewitnesses, or others, to take responsibility for their errors.

In addition, such a process of restorative innocence would allow participation of others in the community. These could be family members of any people involved, other local officials, or other interested members of the community. Allowing their participation would signal to the criminal justice participants—prosecutor, judge, jury, and others—that they act as representatives of the state and that their power rests in the delegation of that authority to them by the larger community.

Finally, a restorative innocence proceeding would allow for a conversation concerning what went wrong. While excellent research in recent years has uncovered many of the reasons for false convictions—erroneous eyewitness testimony, faulty forensic science, rushes to judgment—engaging in a post-mortem with all involved could both yield important lessons as well as serve to help deter similar errors in the future, particularly for repeat actors in the criminal justice system.

At the end of the proceeding, everyone would leave without any further consequence. In addition, there would be no additional legal consequence for admissions or conversations during the proceeding.

To make this model work, there are several logistical hurdles. First, the restorative innocence commission would need to be established and possess the power to compel attendance of those involved. This could work similar to the subpoena power of courts.

Second, to work properly, the proceeding would provide immunity to all involved in order to foster honest discussion, allow for apology and remorse, and create the possibility for healing and personal growth on the part of all involved. As such, the decision to engage in such a proceeding would be the voluntary choice of the exonerated inmate, as choosing this path would practically forego any tort lawsuit against the state for the false imprisonment.

Third, the commission would need a strong, experienced mediator to conduct the proceeding. The ability of this person to foster an open atmosphere is essential to the success of the process.

While perhaps not for every case of exoneration, this restorative innocence approach holds promise in several important ways. Currently, there is no mechanism for the falsely accused to express their emotions concerning their experience to those responsible for putting them in prison. Similarly, there is no mechanism for those who played a role in the false conviction—irrespective of whether their errors were intentional, negligent or innocent—to offer apology or remorse to the falsely convicted.

Certainly in some cases, prosecutors and police might not take responsibility for their errors, but there is little harm in offering that opportunity, particularly in a public venue. Even if they said nothing, the experience of participating in a restorative innocence proceeding has the potential to mitigate similar errors in the future.

In sum, this short paper offers a response to the problem of innocence by proposing a way respond to these travesties of justice that offers the possibility of both healing and change.